FILE COPY

In the

Supreme Court of the United States

October Term, 1952.

No. 382.

JESSIE L. O'DANIEL (Plaintiff-Appellant in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (Defendant-Appellee in the Court Below),

Respondent.

No. 383.

JESSIE L. O'DANIEL, Executrix of the Will of WILLIAM BRYAN O'DANIEL, Deceased (Plaintiff-Appellant in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (Defendant-Appellee in the Court Below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PHILIP PRICE,
HUGH B. COX,
JOHN R. WALL,
BARNES, DECHERT, PRICE, SMITH & CLARK,
1320 Packard Building,
Philadelphia 2, Pa.,
Attorneys for Respondent.

[illegible], 30 Chestnut St., Phila. 6, Pa.

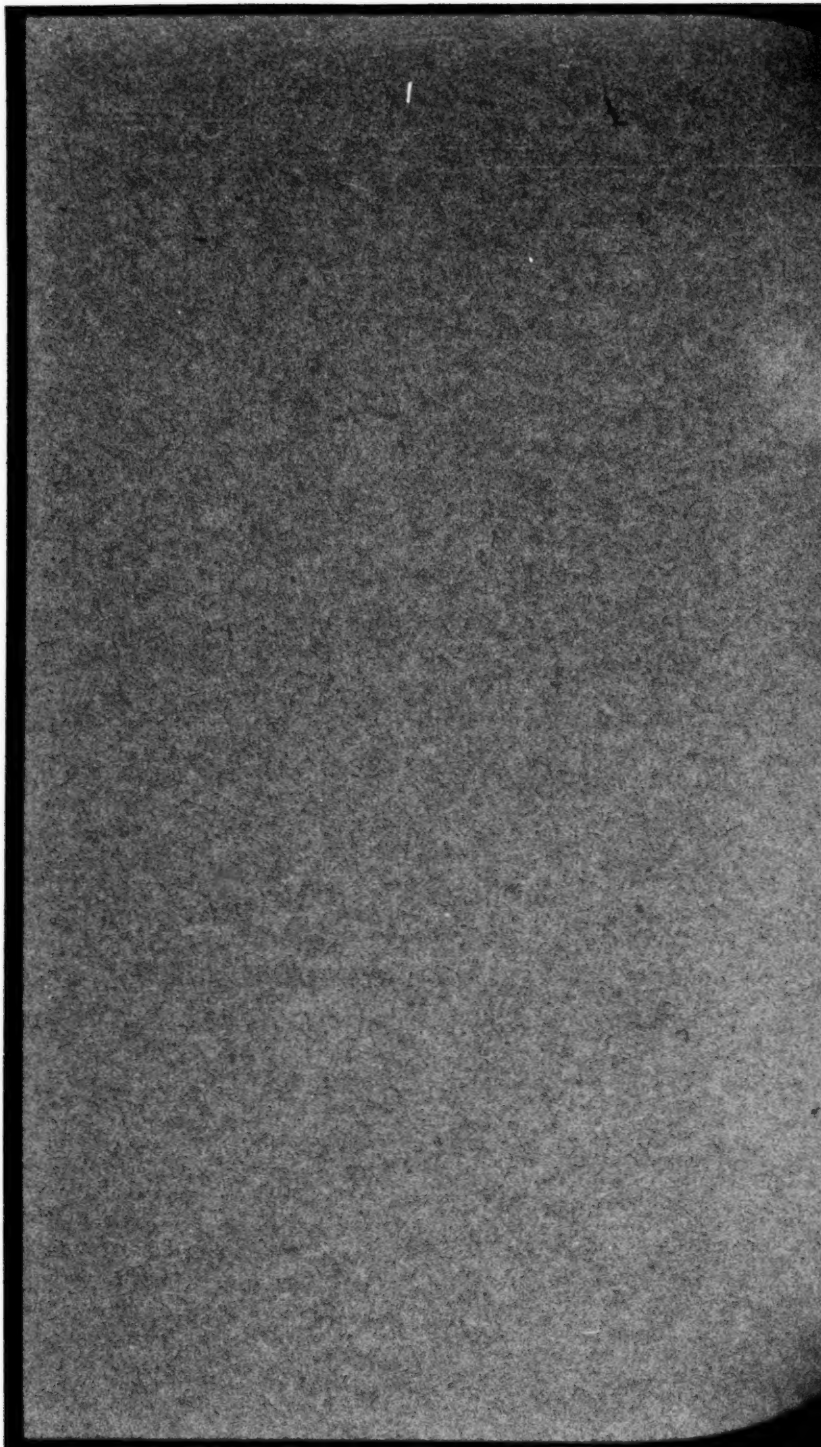

TABLE OF CONTENTS OF BRIEF.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Argument	5
I. The Petition Does Not Raise Any Question of Gravity or General Importance That Deserves Consideration by This Court	5
II. The Courts Below Correctly Construed and Applied Pennsylvania Law	6
A. The Supreme Court of Pennsylvania has clearly laid down the rule that to attempt to board a moving train is negligence *per se* and bars recovery for any consequent injury	6
B. There was no emergency	9
Conclusion	10

TABLE OF CITATIONS.

	Page
Boulfrois v. United Traction Company, 210 Pa. 263, 59 Atl. 1007 (1904)	7
Bradney v. Philadelphia Rapid Transit Company, 232 Pa. 127, 81 Atl. 187 (1911)	8
Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938)	5
Hawkins v. Director General of Railroads, 277 Pa. 213, 121 Atl. 46 (1923)	8
Hower v. United Traction Company, 231 Pa. 626, 80 Atl. 1129 (1911)	8
Hunterson v. Union Traction Company, 205 Pa. 568, 55 Atl. 543 (1903)	7
Johnson v. The West Chester and Philadelphia Railroad Company, 70 Pa. 357 (1872)	6, 7, 9
Kasanovich, Admrx., v. George et al., 348 Pa. 199, 201-2, 34 A. (2d) 523 (1943)	5
MacGregor, Executor, v. State Mutual Life Assurance Co., 315 U. S. 280, 281 (1942)	5
McCracken v. Consolidated Traction Company (No. 1), 201 Pa. 378, 50 Atl. 830 (1902)	6
Montgomery et ux. v. Philadelphia, 270 Pa. 346, 113 Atl. 357 (1921)	10
Powelson v. United Traction Company, 204 Pa. 474, 54 Atl. 282 (1903)	6
Purvis v. Buffalo R. & P. R. R. Co., 219 Pa. 195, 68 Atl. 189 (1907)	8, 9
Quinn v. Philadelphia Rapid Transit Company, 224 Pa. 162, 73 Atl. 319 (1909)	8
Reddington v. Philad. Traction Co., 132 Pa. 154, 19 Atl. 28 (1890)	9
Schiele et al. v. Motor Freight Express Inc., et al., 348 Pa. 525, 36 A. (2d) 467 (1944)	10
Smith v. Lehigh Valley Transit Co., 296 Pa. 212, 145 Atl. 818 (1929)	10
Tobin v. Pennsylvania Railroad, 211 Pa. 457, 60 Atl. 999 (1905)	8

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 382.

JESSIE L. O'DANIEL (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

No. 383.

JESSIE L. O'DANIEL, EXECUTRIX OF THE WILL OF WILLIAM BRYAN O'DANIEL, DECEASED (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 62a) is reported in 162 F. (2d) 414. The opinion of the District Court (R. 55a) is reported in 72 F. Supp. 15.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Question Presented.

Whether the United States District Court for the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit correctly held that under the law of Pennsylvania the attempt of the plaintiff's decedent to board a moving train constitutes negligence as a matter of law so as to bar recovery for his death resulting therefrom.

Statement.

Petitioner, a resident of Tennessee, brought two actions in the United States District Court for the Eastern District of Pennsylvania to recover for the death of her husband, William O'Daniel, who was killed in an unsuccessful attempt to board an electric suburban train operated by the Respondent on September 28, 1943, after it had started to move out of Respondent's station at Ardmore, Pennsylvania. The jurisdiction of the District Court was based solely upon diversity of citizenship. The actions were tried together.

O'Daniel, a regular commuter, was late for the train on the morning in question. The train reached the station before him, and in an effort to catch it he ran diagonally across the automobile driveway from the bank building corner to the station platform, a distance of some 90 feet (R. 11a). Before he reached the station, all the passengers on the platform had boarded the train and the signal to start the train was given just as he reached the south edge of the station platform, which at that point was 20 feet wide (R. 7a). The starting signal was heard by a Miss Vaux, who had alighted from the train when it arrived at Ardmore station, walked around the end of the station building and was about 30 feet out in the driveway (R. 14a) when she stopped and turned around to see whether O'Daniel would make it (R. 13a). Presumably the starting signal was also heard by O'Daniel because, instead of turning after he had passed the end of the station building and running toward the steps of the car which were nearest

to him, he proceeded directly across the platform (R. 20a, 21a), arriving at the north side of the platform adjacent to the train just as the train started (R. 14a). He then stood still alongside the main body of one of the cars (R. 14a-15a) and waited for the movement of the train to bring the steps of the car to him (R. 15a, 17a, 21a). When they came opposite to him he grasped the iron hand hold on the side of the car (R. 15a), took a couple of hasty steps "to build up momentum in order to help him board the train" (R. 26a) and "all of a sudden" (R. 15a) fell under the train and was killed.

The only witnesses who testified about the accident were two women called by the plaintiff, one of whom testified that she was unable to say how fast the train was moving at the time the steps reached O'Daniel (R. 20a), and the other of whom said that the train "was moving slowly" (R. 24a) when she saw O'Daniel on the platform, but was not asked and did not testify how fast it was moving when O'Daniel attempted to board it. However, there was no doubt that the train was moving, and at an accelerating speed, since it was leaving the station, and plaintiff's two witnesses not only did not testify, but did not even suggest, that the train was moving at a speed "so negligible" that they could not fix its speed, as is repeatedly but quite inaccurately (see R. 20a, 21a, 24a) asserted in petitioner's brief, as on pages 13, 19, 37, 38 and 43.

There was no evidence that O'Daniel, in his diagonal run across the driveway to the southeast corner of the station building, was visible to any member of the train crew, nor was there any evidence that any of the crew was in a position to see him when the signal to start the train was given by sounding the starting whistle, which is done either from the platform or from the inside of the car. When the starting whistle sounded O'Daniel had just reached the south edge of the station platform (R. 14a). The station building, from behind which O'Daniel suddenly

emerged on the south edge of the station platform just as the starting whistle sounded, was 48 feet long (R. 9a) and effectively screened him from anyone standing beside the train on the north side of the platform. Nor was there any evidence that any of the crew was hanging out beyond the side of the train so as to be able to see him when he crossed the platform and stood close to the train, waiting for the steps of the car next to which he was standing to reach him (R. 15a), or that if they had seen him stop running and stand alongside the train on the platform, they would have been bound to know he would not concede that he had missed the train, and wait a few minutes for the next one, but would assume the risk of trying to clamber aboard the moving train.

Petitioner likewise failed to show accurately how far the train moved before O'Daniel tried to board it and how far his "couple of steps" (R. 25a, 26a, 27a) took him alongside the train before he fell. Under the petitioner's evidence the first distance could not have been less than 12 feet but was probably more (R. 45a, 46a, 58a) and the second distance was not even estimated.

Although the trial judge had "very grave doubts as to there being any evidence . . . of negligence on the part of the defendant" (R. 49a), he did not rule on that part of respondent's motion under Rule 50, which was presented at the close of plaintiff's case, but directed verdicts for the defendant because the deceased was guilty of contributory negligence in attempting to board a moving train (R. 48a, 49a) which, under the law of Pennsylvania, barred any recovery for his death. Similarly, in the opinion subsequently filed the District Court assumed *pro arguendo* that defendant was negligent, but expressly did not pass upon that question because it was unnecessary to do so (R. 60a). The Circuit Court affirmed the judgments entered by the District Court and adopted that court's opinion as its own (R. 62a).

ARGUMENT.

I. The Petition Does Not Raise Any Question of Gravity or General Importance That Deserves Consideration By This Court.

No federal question is raised by the petition. The right of the petitioner to recover for the death of the decedent is governed by Pennsylvania law. *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1938). The only issue raised herein is whether under Pennsylvania law the petitioner is barred from recovery because her decedent was guilty of contributory negligence as a matter of law in attempting to board a moving train, since contributory negligence is an absolute bar to recovery in Pennsylvania. *Kasanovich, Admrx., v. George et al.,* 348 Pa. 199, 201-2, 34 A. (2d) 523 (1943). The petitioner's argument that she has been deprived of her right to a jury trial improperly assumes that under Pennsylvania law there is some issue of fact which should have been submitted to the jury.

In the courts below the Pennsylvania law was construed and applied by a Pennsylvania Federal District Judge of long experience and by three circuit judges whose circuit includes Pennsylvania, two of whom had long experience at the Pennsylvania bar. There is no merit in petitioner's contention that the decision below is in conflict with decisions of the Supreme Court of Pennsylvania. See pp. 6-9, *infra.* In these circumstances it is submitted that the decision of the courts below should not be disturbed and that review by this Court is unnecessary. Compare *MacGregor, Executor, v. State Mutual Life Assurance Co.,* 315 U. S. 280, 281 (1942).

II. The Courts Below Correctly Construed and Applied Pennsylvania Law.

A. *The Supreme Court of Pennsylvania has clearly laid down the rule that to attempt to board a moving train is negligence* per se *and bars recovery for any consequent injury.*

In eight cases decided in the first ten years following the turn of the century, the Supreme Court of Pennsylvania reiterated again and again, as clearly as the English language would permit, the rule that to get on or off a moving train is negligence *per se*. In these decisions the Supreme Court of Pennsylvania specifically limited to their own peculiar factual situations the two or three earlier decisions, including *Johnson v. The West Chester and Philadelphia Railroad Company*, 70 Pa. 357 (1872), upon which petitioner relies.

McCracken v. Consolidated Traction Company (No. 1), 201 Pa. 378, 50 Atl. 830 (1902), involved facts that are not similar to those of the instant cases, but the court's dictum (201 Pa. at page 383) made clear what it assumed had always been the law:

> "It is per se negligence to get on or off a moving car; yet we see usually prudent and careful men, every day commit that act and comparatively few are injured; *but, nevertheless, it is negligence:* . . ." (Emphasis supplied.)

In *Powelson v. United Traction Company*, 204 Pa. 474, 54 Atl. 282 (1903), the court held that it was for the jury to determine under the evidence in that case whether or not the plaintiff, who had negligently boarded a moving car, had reached a place of safety before he fell, and thus whether his injuries were attributable to his boarding a moving car or to the traction company's subsequent negligence in accelerating with a jerk. But the court said (204 Pa. 474, 476):

> "To step on or off a moving car, whether the power which propels the car be steam or electricity, is per se, negligence, and if injury results to the passenger he cannot recover damages . . ."

Only a few months later, in *Hunterson v. Union Traction Company,* 205 Pa. 568, 55 Atl. 543 (1903), the court affirmed a judgment of nonsuit against a plaintiff who had boarded a street car while it was slowing down but while it was still moving at three or four miles an hour. Even Mr. Justice Mestrezat, who filed a lengthy dissent from the holding of the majority, declared (205 Pa. 568, 579):

> "Where one attempts to board a moving car and is injured by his own carelessness he cannot recover, and it is immaterial at what rate of speed the car is running."

The next case, *Boulfrois v. United Traction Company,* 210 Pa. 263, 59 Atl. 1007 (1904), is the last in the Supreme Court of Pennsylvania in which the *Johnson* case is even mentioned on this point, and it is referred to as a "rare exception" to the well established rule that it is negligence *per se* to attempt to get on or off a moving train. In the very first sentence of the opinion the court said:

> "We desire it to be distinctly understood that in Powelson v. United Traction Co., 204 Pa. 474; Hunterson, v. Traction Co., 205 Pa. 568 and Bainbridge v. Traction Co., 206 Pa. 71, we had no intention of relaxing the well-established rule, 'That to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it.'"

and later (210 Pa. 263, 266):

> "We have tried to make our meaning plain; if we have failed it is either because our obtuseness of perception or poverty of language fails to make plain to others what is plain to us."

Tobin v. Pennsylvania Railroad, 211 Pa. 457, 60 Atl. 999 (1905), was decided the following year. The court affirmed per curiam a judgment of nonsuit entered against a passenger who boarded a train which had just started to move as he arrived at the top of the steps which led to the station platform. The court said (211 Pa. 457, 458):

> "No conclusion could have been reached from the plaintiff's testimony that would have relieved him from the imputation of negligence. There was nothing in the circumstances to make the case an exception to the rule that it is negligence per se to step on a moving train."

In *Purvis v. Buffalo R. & P. R. R. Co.,* 219 Pa. 195, 68 Atl. 189 (1907), the court also affirmed a judgment of nonsuit on the ground that the plaintiff was contributorily negligent as a matter of law for attempting to get off a moving train, and stated by way of explanation (219 Pa. 195, 201):

> ". . . The rule is founded on solid considerations of public policy for the safety of the traveling community, the exceptions are few in number and the cases must come very clearly within them."

The last two cases decided by the Supreme Court of Pennsylvania during this period, which also restate positively the rule of law that it is negligence *per se* to attempt to board a moving car, are *Quinn v. Philadelphia Rapid Transit Company,* 224 Pa. 162, 73 Atl. 319 (1909), and *Bradney v. Philadelphia Rapid Transit Company,* 232 Pa. 127, 81 Atl. 187 (1911), and since that time the doctrine of those cases has been considered so firmly established that it has never been challenged in the courts of this state.

Hower v. United Traction Company, 231 Pa. 626, 80 Atl. 1129 (1911), and *Hawkins v. Director General of Railroads,* 277 Pa. 213, 121 Atl. 46 (1923), are direct authority for the equally well established Pennsylvania rule that it

is contributory negligence as a matter of law to alight from a moving car, and this is so even if the passenger alights at the invitation of the conductor of the train, *Purvis v. Buffalo R. & P. R. R. Co.*, 219 Pa. 195, 68 Atl. 189 (1907), supra, whatever may have been said on the subject in 1884, or at some other early date.

The law of Pennsylvania is made abundantly clear by these decisions and the Court below was bound to follow them and not let a jury speculate whether the passenger was justified in believing that he could board, without injury, a train that was already leaving the station. As was said in the *Purvis* case, supra, 219 Pa. at p. 201, "the rule [that one may not recover damages suffered in boarding a moving train] is founded on solid considerations of public policy for the safety of the traveling community" and the fact that it has not been modified in any later case is conclusive evidence of how deeply rooted it is in the law of Pennsylvania. The present attempt to circumvent it by bringing suit in the Federal rather than in a state court and basing an argument on theories that have found no acceptance in Pennsylvania for more than fifty years, should not, it is submitted, be allowed to succeed. Compare *Reddington v. Philad. Traction Co.*, 132 Pa. 154, 19 Atl. 28 (1890).

The *Johnson* case in 1872, the *Kilgore* case in 1858, the *Lyons* case in 1889, the *Peters* case in 1887, like the *Webster* case in 1884, all relied on by the petitioner in her brief (pp. 20-21), not only involve factual situations fundamentally different from the facts of this case and therefore could not control it, but the principles considered in them were abandoned long ago and definitely rejected in the more recent cases above considered.

B. *There was no emergency.*

There was no sudden emergency or peril which might have relieved O'Daniel from the consequences of his careless conduct, as argued by petitioner (pp. 18 & ff.). The

situation which confronted him when he stood waiting for the steps of the car to come to him was one which he had anticipated and had an opportunity to consider from the time he first broke into a run approximately 100 feet from the train, and it is absurd to call the natural consequence of his deliberate act an "emergency." Moreover, even if it could be so described, the situation was the result of a voluntary choice on his part and hence his contributory negligence in placing himself in such a position precludes the petitioner, under Pennsylvania law, from availing herself of that doctrine. *Montgomery et ux. v. Philadelphia,* 270 Pa. 346, 113 Atl. 357 (1921); *Smith v. Lehigh Valley Transit Co.,* 296 Pa. 212, 145 Atl. 818 (1929); *Schiele et al. v. Motor Freight Express Inc., et al.,* 348 Pa. 525, 36 A. (2d) 467 (1944).

Conclusion.

It is accordingly submitted that the petition for certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
HUGH B. COX,
JOHN R. WALL,
Attorneys for Respondent.